IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

THE UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 6:19-MJ-671-JCM-1**
	§	
JAMES MICHAEL PIERCE,	§	
	§	
Defendant.	§	

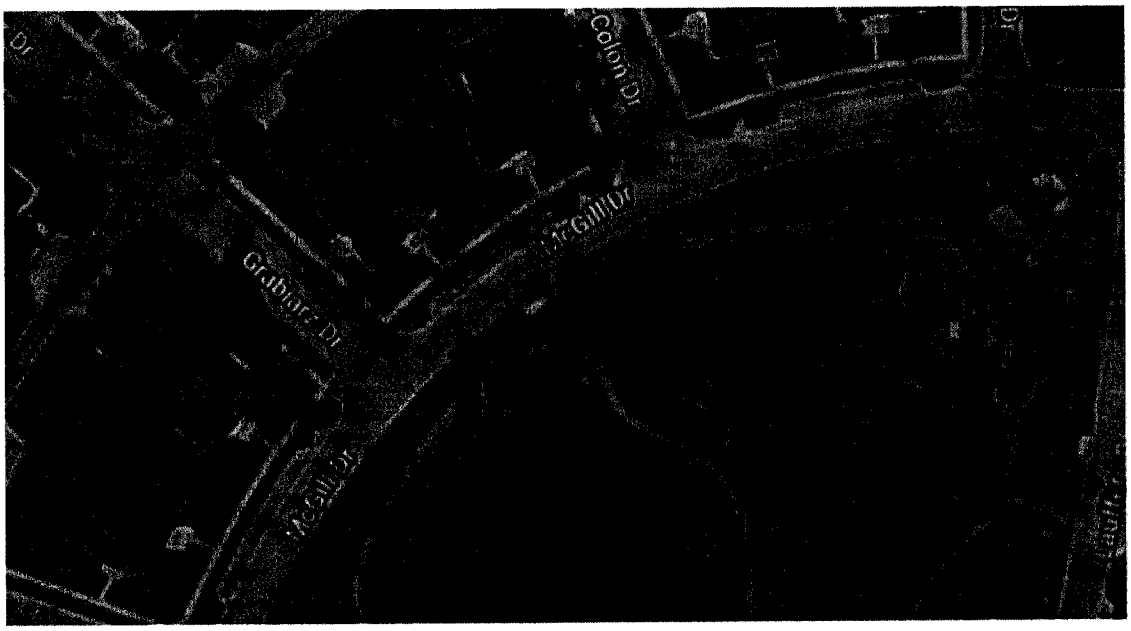
ORDER

Before the Court are Defendant's Motion to Dismiss, Def.'s Mot. Dismiss, ECF No. 17, Defendant's Motion to Suppress, Def.'s Mot. Suppress, ECF No. 18, the United States' Response to Defendant's Motion to Dismiss, Pl.'s Dismiss Resp., ECF No. 19, and the United States' Response to Defendant's Motion to Suppress, ECF No. 19. On July 12, 2019, the Court conducted a hearing with all parties and their counsel. For the reasons that follow, the Court **DENIES** Defendant's Motion to Dismiss and Motion to Suppress Evidence.

I. BACKGROUND

Based upon the filed Stipulation of Fact and Admissibility of Evidence and the testimony of live witnesses, the Court makes the following findings of fact. On March 21, 2019, at 2:30 a.m., military policeman PFC Belfer[1] drove through the Kouma Village housing area on the Fort Hood Military Reservation and passed 48424 McGill Drive, the residence of Defendant James Michael Pierce. Several parking spaces were created immediately adjacent to McGill Drive, including one in front of Defendant's residence:

[1] PFC Belfer's first name is unknown.



When he passed the residence, PFC Belfer noted a vehicle parked in front of the residence in the street-adjacent parking with its engine running and lights on. PFC Belfer also observed an individual—later revealed to be Defendant—appeared to be asleep in the driver's seat of the vehicle. PFC Belfer continued his patrol and did not stop to inspect the vehicle.

Approximately thirty minutes later, PFC Belfer drove by again and found the vehicle still parked on the side of the road in the parking space in front of 48424 McGill Drive. PFC Belfer also observed the vehicle was still running with its lights on. The parking space did not include any signage or markings to identify its owner or that it was reserved. The parking space was separated from 48424 McGill Drive by a sidewalk and the residence's front lawn. Besides being in front of 48424 McGill Drive, nothing about the space suggested it belonged to Defendant.

PFC Belfer parked in the parking space behind Defendant's vehicle with his headlights on and his spotlight pointed at the vehicle. PFC Belfer then exited and approached the parked vehicle and knocked three times on the window for the purpose of making a wellness check. The occupant, Defendant Pierce, responded by briefly moving his vehicle then stopping and rolling down his window. With the window open, PFC Belfer noted Defendant smelled of alcohol, had

bloodshot and watery eyes, and slurred his words. PFC Belfer directed Defendant to exit the vehicle, leading Defendant to stumble while doing so. PFC Belfer conducted several field sobriety tests of Defendant, none of which Defendant successfully completed. PFC Belfer promptly arrested Defendant for DWI.

The United States charged Defendant with driving while intoxicated pursuant to 18 U.S.C. § 13 and Texas Penal Code § 49.04(a). Defendant moves to dismiss the information and suppress any evidence obtained after PFC Belfer parked behind Defendant's vehicle. Defendant argues the information should be dismissed because the parking spot on the side of the street is not a "public place" as required for the offense of driving while intoxicated. He also argues the evidence should be suppressed because PFC Belfer unreasonably seized Defendant by knocking on Defendant's car window with the lights from his vehicle focused on Defendant and searched Defendant by entering the curtilage of his residence (the parking space). The United States responds that the parking space is a public place as defined by the Constitution and Texas Penal Code, and therefore Defendant drove in a public place as required for the offense of DWI and was not protected by the Fourth Amendment to the United States Constitution. Defendant did not reply.

II.
RELEVANT LAW

Under Federal Rule of Criminal Procedure 12(b)(3)(B), a defendant may move to dismiss based on a defect in the indictment or information, among other reasons. The court must decide the motion to dismiss before trial unless it finds good cause to defer a ruling. FED. R. CRIM. P. 12(d). "[A] motion to dismiss an indictment for failure to state an offense is a challenge to the sufficiency of the indictment." *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004). "When the court decides such a motion, it is required to 'take the allegations of the indictment as true and to determine whether an offense has been stated.'" *United States v. Villalonga-Herrera*, No. 1:18-

CR-279-LY, 2019 WL 361316, at *2 (W.D. Tex. Jan. 29, 2019) (citing *United States v. Hogue*, 132 F.3d 1087, 1089 (5th Cir. 1998)).

A person commits the offense of driving while intoxicated "if the person is intoxicated while operating a motor vehicle in a public place." Tex. Pen. Code § 49.04(a) (West 2017). The Texas Penal Code defines a public place as "any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops." Tex. Pen. Code § 1.07(a)(40) (West 2017). The federal Assimilative Crimes Act (ACA) assimilates the Texas Penal Code offense and definitions of DWI on Fort Hood. *United States v. Collazo*, 117 F.3d 793, 795 (5th Cir. 1997). Thus, while the ACA is a federal statute subject to federal interpretation, state court interpretations of the assimilated state statute are persuasive authority. *Collazo*, 117 F.3d at 795 (citing *United States v. Brown*, 608 F.2d 551, 553 (5th Cir. 1979)).

III.
ANALYSIS

Defendant moves to dismiss the information because he was not driving in a public place as defined by Texas Penal Code § 49.04 but was instead driving on curtilage to his home as defined by the United States Constitution. Def.'s Mot. Dismiss at pp. 3-4. He also moves to suppress the evidence obtained by PFC Belfer because the parking space is curtilage to his home as defined by the United States Constitution. Def.'s Mot. Suppress at pp. 3-4. Thus, at issue is whether the parking space constitutes a public place under the Texas Penal Code or curtilage to the home under the United States Constitution.

A. The Texas Penal Code

Defendant moves to dismiss the information because he was not driving in a public place as defined by the Texas Penal Code. "Public place" is defined as "any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops." Tex. Pen. Code § 1.07(a)(40). Given this broad language, courts possess wide discretion to determine what spaces beyond the enumerated list are considered public. *State v. Gerstenkorn*, 239 S.W.3d 357, 359 (Tex. App.–San Antonio 2007, no pet.) (citing *Shaub v. State*, 99 S.W.3d 253, 256 (Tex. App.–Fort Worth 2003, no pet.); *State v. Nailor*, 949 S.W.2d 357, 359 (Tex. App.–San Antonio 1997, no pet.)). Generally, courts consider any space accessible to the public to be a public place. *Loera v. State*, 14 S.W.3d 464, 467 (Tex. App.—Dallas 2000, no pet.) (citing *Woodruff v. State*, 899 S.W.2d 443, 445 (Tex. App.—Austin 1995, pet. ref'd)). Thus, the relevant inquiry here is whether the parking space is accessible to the public. *Id.*

As noted at the hearing on Defendant's Motions, the Court's prior decision in *United States v. Howled* is particularly instructive. No. 6:15-mj-00731, 2015 WL 5970389, at *2-3 (W.D. Tex. Oct. 5, 2015) (Manske, M.J.). There, the government charged a defendant with DWI after he drove while intoxicated through a dirt field in a military training area. *Id.* The defendant argued the dirt field in a military training area was not accessible to the public and therefore was not a public place. *Id.* at *4. The defendant directed the Court to the Texas appellate court decision *Fowler v. State*, where the Amarillo Court of Appeals concluded an unpaved and fenced-off private driveway a quarter-mile from an isolated country road was not public. 65 S.W.3d 116, 119 (Tex. App.—Amarillo 2001, no pet.). The *Howled* defendant argued *Fowler* controlled his case as well, but the Court disagreed. 2015 WL 5970389, at *4.

In *Fowler*, the government charged the defendant for driving while intoxicated on his own property, a quarter mile from a public road, behind a fence, and in a remote area with little public traffic. 65 S.W.3d at 119. The *Howled* defendant, however, was driving adjacent to a regularly-trafficked road in an open, ungated area. 2015 WL 5970389, at *4-5. Though members of the public were not allowed in the *Howled* field, the evidence demonstrated the public could access the area and regularly did. *Id.* The *Howled* Court therefore concluded the open field was distinguishable from *Fowler* and was a public place under Texas Penal Code § 1.07(a)(40). *Id.*

Here, the Court likewise concludes the roadside parking space is a public place. Two witnesses—the housing community manager and resident coordinator for Kouma Village—testified any member of the public is permitted to park in the roadside parking space in front of 48424 McGill Drive.[2] The witnesses testified that residents often called to ask about parking but were informed members of the public are authorized to park in the roadside spaces. The housing community manager testified residents would often assume the parking space was for their exclusive use until Kouma Village staff corrected them. Further, the resident coordinator for Kouma Village testified she reviewed Defendant's lease agreement with him and did not represent to him at any time that the space belonged to him. Indeed, the parking space is part of a road running through a neighborhood on Fort Hood and is not secluded or fenced from the public or even far from public traffic. The space is adjacent to—in fact, part of—a regularly-trafficked road accessible to the public and bears more similarity to *Howled*, 2015 WL 5970389, at *4-5, than

[2] Defendant testified at the hearing that he understood the parking spot to be reserved solely to him. This is irrelevant for two reasons. First, nothing in the Texas Penal Code defines a public place by the defendant's understanding of whether the location is public or private. Tex. Pen. Code § 1.07(a)(40). Second, even if he did own the space, the Texas Penal Code considers only whether the public could access it, even if a law or regulation barred the public from doing so. *See Howled*, 2015 WL 5970389, at *4 (holding a restricted tank field was still accessible to the public even if the public was not allowed to enter the area).

Fowler, 65 S.W.3d at 119. The Court concludes the roadside parking space is a public place as defined by the Texas Penal Code.

B. The United States Constitution

Defendant also moves to dismiss the information and suppress all of PFC Belfer's testimony because the parking space is part of the curtilage of his home.[3] Def.'s Mot. Dismiss at pp. 3-4; Def.'s Mot. Suppress at pp. 3-4. The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend IV. A defendant maintains a reasonable expectation of privacy in the curtilage immediately surrounding his or her home. *Florida v. Jardines*, 569 U.S. 1, 5-7 (2013). Courts use four factors to determine whether an area is curtilage: (1) proximity of the area to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, 480 U.S. 294, 301 (1987).

The Fifth Circuit recently addressed the extent of curtilage in *United States v. Beene*, 818 F.3d 157 (5th Cir. 2016). There, police—without a warrant—brought a dog onto the defendant's driveway to sniff his vehicle for drugs. *Id.* at 162. The defendant argued the driveway was part of the curtilage of his residence and therefore the police needed a warrant to conduct the search.

[3] Defendant also moves to suppress the evidence because he was unconstitutionally seized as he was not in a public place and was not asked if he was willing to answer some questions. Def.'s Mot. Suppress at p. 4. As discussed throughout this Order, Defendant was in a public place in a roadside parking space. Regardless, he provides no precedent to suggest PFC Belfer's conduct—by parking behind the vehicle and knocking on the window—constituted a seizure of him or his property. While Defendant is correct that PFC Belfer never asked "if Pierce was willing to answer some questions[,]"Defendant never explains how PFC Belfer would have asked him that question in the time before he knocked on the window to wake Defendant up. Def.'s Mot. Suppress at p. 4. To suppress evidence, the defendant must initially establish he was searched or seized without a warrant. *United States v. Roch*, 5 F.3d 894, 897 (5th Cir. 1993). He failed to establish a seizure here.

Id. The Fifth Circuit disagreed, concluding that only the proximity of the driveway, which was connected to the defendant's home, weighed in favor of finding it was curtilage. *Id.* The court concluded the remaining *Dunn* factors—that the driveway was observable from the street, not gated or blocked from public access, and not marked by signs indicating the public was not permitted—weighed against a finding of curtilage. *Id.* Given three of the four factors weighed against curtilage, the court found the police were permitted to enter the driveway without a warrant. *Beene*, 818 F.3d at 162-63.

The Court concludes the Fifth Circuit's reasoning in *Beene* is persuasive here. *Id.* As in *Beene*, the roadside parking space at issue is not surrounded by an enclosure or fence and is instead open and observable to the public on McGill Drive. Defendant also made no effort to protect the privacy of the space by posting signage to deter public access. In fact, unlike in *Beene*, the parking space here is not even near Defendant's home—it is separated from the home by a public sidewalk and Defendant's lawn. Thus, the Court concludes the roadside parking space in front of Defendant's home is not curtilage protected by the Fourth Amendment to the United States Constitution and therefore no unconstitutional search occurred.

IV.
CONCLUSION

In sum, the Court concludes Defendant did not state a sufficient basis for dismissal of the information or suppression of evidence. Neither the Texas Penal Code nor the United States Constitution consider a roadside parking space on a regularly-trafficked public road a private space. Thus, to the extent the United States can prove Defendant operated a vehicle while intoxicated in this area, such conduct is a violation of § 49.04(a) of the Texas Penal Code. Likewise, PFC Belfer did not need a warrant to investigate Defendant's running vehicle at 2:45

a.m. and none of his observations that followed are subject to suppression. Accordingly, Defendant's Motion to Dismiss and Motion to Suppress are hereby **DENIED.**

SIGNED this 22nd day of July, 2019.

THE HONORABLE JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE